IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 296 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

DIPAKBHAI V CHAUDHARI

Versus

STATE OF GUJARAT

Appearance:

MR SG UPPAL for Petitioner

MR SR DIVETIA, APP, for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 18/03/98

ORAL JUDGEMENT (Per S.M.Soni, J.)

Deceased Hirabhai Kuverjibhai was a resident of Dolvana. He had agricultural land in the sim of village Bamanmaldur. Both the villages are contiguous. Father of the appellant-accused was grazing his ox in the field of deceased which the deceased did not approve of. It

appears that there was enmity on this ground between the two. On 8th July, 1990, deceased with his wife and two daughters had gone to their field in the village of Dolvana. At about 7.00 in the evening, wife of the deceased and one daughter named Sarla returned home and deceased and his other daughter Kanchan remained in the field. They were also returning home after some time. When they reached near the field of Daniben after just crossing the field of Vasa Mavji, accused No.1 Dipakbhai came from behind and inflicted axe blows on the head and temple region of deceased Hirabhai. Daughter Kanchan who was accompanying him shouted and cried. Hearing the same, one Minar Harisinh rushed there. When he reached near the deceased, he saw all the accused running away. He also saw axe in the hand of Dipakbhai, accused No.1. He also saw Hirabhai having fallen there and Kanchanben, PW 2, shouting and crying there. Thereafter, villagers have also gathered. Then, deceased Hirabhai was bodily lifted and taken to his house. He was then taken in a cart to Vyra from where he was taken to Surat. A complaint was filed in the evening of 9th July, 1990 by about 5.15 and the investigation started. Salamsinh, Police Head Constable, PW 12, was inquiring into the complaint and he has recorded statement of deceased Hirabhai and his wife Gangaben and he has proceeded with further formalities of investigation. On 11th July, 1990, he received 'vardhi' from Surat hospital that said Hirabhai has died. So the offence was registered under section 302 of the Indian Penal Code and the investigation was handed over to the Police Sub-Inspector, Satnamsinh, PW 13. On completion of the investigation, accused were chargesheeted in the court of Judicial Magistrate, First Class, Vyara, who in his turn committed the case against the accused in the court of Sessions Judge at Surat.

The learned Addl. Sessions Judge framed charge against the accused to which all the accused pleaded not guilty and claimed to be tried. The trial was commenced and completed and the learned Addl. Sessions Judge, held accused No.1, present appellant, ('accused' for short) guilty of offence punishable under section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life and a fine of Rs.200 in default, rigorous imprisonment for two months. Against this judgment and order, accused No.1 has filed this appeal.

Learned advocate Mr Uppal appearing for the accused has challenged the order of conviction on the grounds, namely, (1) that the learned Addl. Sessions Judge has erred in holding the accused guilty despite the

prosecution having failed to bring home the charge of the accused as there is no sufficient evidence against the accused, (2) that there is delay in lodging the complaint against the accused and the said delay is not explained and thereby created a suspicion in the case of prosecution and benefit thereof should go to the accused, (3) that all the prosecution witnesses are related to the deceased and they have fabricated case against the accused (4) testimony of Minar Harisinh, PW 3, is neither cogent nor convincing and therefore cannot be used to corroborate the evidence of Kanchanben, PW 2, a child witness, (5) the learned Addl. Sessions Judge ought to have rejected the evidence of the prosecution witnesses as all the witnesses are interested and partisan witnesses and their evidence is not corroborated by any independent circumstances on record. Mr Uppal further contended that (6) from the record it appears that father of the accused must have instructed the accused to go and tell the deceased that he should not object their grazing bullocks in the field. Instead of conveying and implementing this direction, if accused has exceeded the same, then also, father of the accused is the real person responsible for this act and when the prosecution has not joined or charged with father of the accused, the accused also should not have been chargesheeted. By this contention, Mr Uppal wants to canvass that the father of the accused is principal offender and when the principal offender is not charged, abetter alone even if charged, cannot be convicted. He also challenged the order of conviction on the following grounds, namely:

(1) that the evidence of PW 2 is not acceptable, reliable and trustworthy on the facts of the case in addition to the witness being a child witness. Her evidence is not corroborated by any independent evidence.

(2) In the alternative it is contended that the case of the accused would fall within the purview of part II of section 304 of Indian Penal Code and the conviction under section 302 is erroneous.

Mr Divetia, learned APP supports the judgment. Mr Divetia contended that there is sufficient evidence on record and the judgment of the learned Addl. Sessions Judge does not call for any interference. Mr Divetia contended that it is the quality of evidence which counts and not the quantity. The evidence of PW 2 corroborated by the evidence of PW 3 is sufficient to convict the appellant. He further contended that though PW 2 is a

child witness, her evidence is convincing and is corroborated by the evidence of PW 3 and her sister PW 5. Mr Divetia further contended that there is no delay in lodging the complaint. He further contended that there is no substance in the allegation that the case against the accused is a fabricated one and the evidence on record speaks by itself about the reality of the case. Mr Divetia further contended that there is no principle in criminal law that in absence of abater being joined as co-accused, the principal cannot be convicted if charges are proved against him. Mr Divetia, therefore, contended that the appeal should be dismissed.

We will first deal with the evidence of child witness Kanchenben, PW 2. PW 2 is aged about 14 years. Learned Addl. Sessions Judge has made a note in the beginning of the evidence to the effect that the witness is given oath after verifying that the witness understands the sanctity of oath. Except this note, there is nothing in her evidence to show that what was the material based on which the learned Judge has come to this conclusion. In our opinion and supported by decisions of the Supreme Court and our own High Court it is desirable that the basis on which the learned Judge comes to the conclusion that the witness understands the sanctity of oath is required to be placed on record. The Supreme Court in the case of Rameshwar Kalyan Singh v. State of Rajasthan (AIR 1952 SC 54) has held in para 7 and 11 of the judgment as follows:

"7. The proviso quoted above must be read along with S.118, Evidence Act and S.13, Oaths Act. In my opinion, an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with in S.118. Every witness is competent unless the Court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It will be observed that there is always competency in fact unless the Court considers otherwise. No other ground of incompetency is given, therefore, unless the Oaths Act adds additional grounds of incompetency it is evident that S.118 must prevail.

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"11. I would add however that it is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate. In the present case, it is plain that the learned Judge had the proviso in mind because he certified that the witness does not understand the nature of an oath and so did not administer one but despite that went on to take her evidence. It is also an important fact that the accused, who was represented by counsel, did not object. Had he raised the point the Judge would doubtless have made good the omission. I am of opinion that Mt. Purni was a competent witness and that her evidence is admissible. In the Privy Council case which I have just cited, their Lordships said --

'It is not to be supposed that any Judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness."

In the case of Sataji Nathaji v. State of Gujarat (17 GLR 254), a Division Bench of this Court has observed in para 34 as under :

"34. It would thus appear that there is no legal requirement to hold a preliminary examination to determine the competence of a child witness and that the failure to conduct such examination will not necessarily affect his evidence. Similarly, though it is the duty of the Court to form an opinion whether such a witness understands the sanctity of oath and the duty to speak the truth, failure on the part of the Court to formally record such an opinion may not by itself be fatal. It is also true that it is not to be lightly supposed that any Judge would accept as a witness a person who he considered was incompetent or incapable not only of understanding the nature of an oath but also the

> necessity of speaking the truth when examined as a witness. However, in a series of decisions it has been laid down time and again over years as a rule of prudence that not only it is desirable that a preliminary examination of a child witness should be made by the Court but that a formal record of such examination should also be maintained. In the case of a criminal prosecution, where the fate of the accused depends on the testimony of such a witness, the imperative necessity of voir dire has been underlined with greater emphasis for obvious reasons. It may be that the incompetence of such a witness to depose to the res gestae or his ignorance about the duty to speak truth may often come out during the examination of the witness. However, it is always desirable to resort to a preliminary examination which will tend to disclose his capacity and intelligence, for, such an examination may expose even a witness who has been fully tutored and who on that account might be able to stand the test of cross-examination. Besides if actual examination is preceded by appropriate questions much of the time may be saved in many cases where it ultimately transpires that the witness lacks the requisite capacity and comprehension. The record of such preliminary examination, if maintained, will enable the appellate Court, which does not have the opportunity to watch the demeanour of the witness, to apply its own mind and to review the decision of the trial Court Judge, if need arises, on these matters. It is for these reasons that voir dire and the maintenance of its formal record have been accepted as an established rule of practice in our Court.

Thus, though the learned Judge was required to record reasons and maintain the formal record showing and suggesting the satisfaction whether it is necessary to give oath or not, in the instant case, the learned Judge has put a note before commencement of the evidence of PW 2 to the effect that after verifying the fact that the witness understands the sanctity of oath, oath is given. Not placing on record the necessary material do not vitiate or adversely affect the evidence of the witness or the fact of giving oath to a minor. We however reiterate that it is desirable that the formal record showing and suggesting the satisfaction whether it is necessary to give oath or not is placed on record.

We will first deal with the evidence of the prosecution to find whether the prosecution has been able to prove beyond reasonable doubt that it is the accused No.1 who had inflicted injuries as a result of which the deceased has died, be it after two days. In the evening of 8th July, 1990, deceased in company of PW 2 had proceeded towards his house after visiting someone in village Dolvan. On the way home, when they reached near the field of Dhaniben Bangji, deceased was assaulted from behind by accused No.1. PW 2 was just ahead of her father and on hearing the impact, she looked back and found the accused giving axe blow on the temple region as well as rear part of the head. According to this witness, other two accused had caught hold of her father and were giving fist blows. Having shouted by PW 2, accused ran away. PW 2 then went home and informed her mother and sister, Sarla, about the incident. Parvin and Raman and Minar reached the scene of offence and brought the injured at home. The question is whether PW 2 can be believed for her say that she saw the accused No.1 inflicting axe blow on the deceased. Perusing the whole evidence of PW 2, we do not find any element from which it can be inferred that her evidence is tainted with being tutored by someone. Accused is very much known to her particularly because they have some dispute about the cattle grazing in their field. It appears from the record, however it is not specific, that village Dolvan and Bamnamaldar are twin villages. PW 2 when saw the incident ran to her house and informed her mother and sister. It being a full moon night and accused No.1 being known to PW 2, the identity of the accused cannot be suspected or doubted. If the assailant is someone else, why PW 2 should name the accused. A dispute of grazing of cattle cannot be said to be so grave that one would like to let go a real culprit and involve the accused No.1 alleging such a meagre motive. A particular act which may amount to offence may be committed by a person, be it for a meagre motive, but if that be the motive and accused is not the real culprit, then we do not think that anyone would allow to let go the real assailant and involve a wrong person. This apart, there does not appear to be any opportunity to tutor PW 2. Learned advocate Mr Uppal has tried to convince us that delay in filing the complaint itself is suggestive of the probability of witness being tutored. We will hereinafter deal with the aspect of delay in filing the complaint and decide whether that delay damages the prosecution case in any way.

PW 2 is a child witness. So there is bound to be

some confusion, but that confusion which has come on record, in our opinion, can be made clear by her evidence which she disclosed to her sister and mother. We may make it clear at this juncture that before the commencement of trial her mother has died and only sister, PW 5 has survived and is examined as witness. Confusion in evidence of PW 2 is to the effect that when she saw the accused inflicting axe blow on her father she shouted. On hearing her shouts, Minar, PW 3 came at the scene of offence and the accused ran away. Then she further stated that thereafter she went home and informed her mother and sister. In the question put by the Court, this confusion is cleared. She has stated that " Parvin, and Raman brought my father home. As I had gone to inform, Parvin had come. I told about the incident to my sister, mother, Parvin and Raman." Thus the confusion is whether Parvin and Raman came to the scene of offence on hearing the shouts raised by PW 2 when she saw the accused inflicting axe blow on her father or after she went home and informed her mother, sister, Pravin and Raman who then brought the injured home. In our opinion, this confusion is cleared by the evidence of Sarlaben, PW 5. PW 5 has categorically stated before the Court that at about 9.30 night, her sister Kanchan came crying at home. Kanchan told that Dipak has given axe blow to their father. Minar and Raman have gone to the place of incident and her father was lifted bodily and brought home. Nothing has been extracted in the cross-examination of this witness as well as the child witness PW 2 to suspect this story or doubt this say. Cross-examination of PW 5 is on the line as to whether her father was able to speak or not. Some contradictions on record, in our opinion, are not that relevant to reject their evidence. This part is alleged to be further corroborated by the evidence of Minar. Minar PW3, in his evidence has stated that "girl Kanchan shouted. On hearing her shouts 'run, run' I alone ran and reached there and saw the accused running away." According to this witness, he went to the place of offence on hearing the shouts of PW 2 from the scene of offence. However, his evidence, except he having brought the injured to his house is not believable. He has replied to the question put by the Court that when he reached the scene of incident, accused were standing near Hira Kaka (deceased). Then he explained that standing means running away. He further explained that he saw means, he saw the accused running away. Thus the evidence of this witness, PW 3, in our opinion cannot be accepted on the point that he had gone to the scene of offence on hearing the shouts of PW 2 and had seen the accused standing or running away. But the fact remains

that at the place of incident, he had gone and deceased was brought home in the injured condition. Thus the evidence of PW 2, in our opinion, is cogent and convincing and reliable and proves the fact that the accused has inflicted axe blows on the temple region and rear part of the deceased.

The fact of incident is told to Parmesh, PW 4, who had gone to inform Harisinh, Sarpanch of the village PW 1. On arrival of Sarpanch, it was decided to take the injured to the hospital and injured was removed to Panchol Primary Health Centre where they reached at about 11.00 a.m. The injured was taken there in a bullock cart. Doctor at Panchol sutured the wound and referred them to Vyara Primary Health Centre where the injured reached at about 1.00 p.m. After admitting the injured in the hospital, it appears that PW 1 has gone to the Police Station and complaint is lodged. The incident took place on 8th July, 1990 by about 9.00 in the night. For the whole night, the injured remained at the house and in the next morning i.e. on 9th July, 1990 on arrival of Sarpanch, he was removed to hospital. PW 2 and 3 have told PW 1 Sarpanch as to the incident and after the injured was taken to hospital at Panchol and then removed to Vyara and on being admitted at Vyara, he has gone to the Police Station and complaint is lodged at about 17.15 hours. The question is when the incident is of 21.00 hours of 8th July 1990 and the complaint is lodged at 17.15 hours on 9th July, 1990, how the delay stands explained so as not to prejudice the case of the prosecution.

Whenever defence raises plea of delay in filing complaint, it is for the defence to show from record that delay throws clouds of suspicion and how. It is also necessary to show something from record that the involvement of accused is motivated and delay is caused to concoct the case. To make out such case in defence, defence is required to show from the evidence of prosecution witnesses who were required to act promptly yet have acted deliberately sluggishly. Normally when prosecution is lodged, be on the basis of alleged delayed complaint, it is on assumption by the prosecution that there is no delay. It is the defence who then has to allege delay. If defence wants to allege delay then defence has to call on the prosecution witnesses whom delay can be ascribed to explain that by providing them an opportunity to explain. Defence cannot, like a bolt from blue, raise the plea at the stage of arguments. Defence has to lay foundation for such plea when the prosecution leads evidence or by way of defence evidence.

Panchol Primary Health Centre is at a distance of about 4 k.m. from Bamnamaldar. There are only female members in the family of the victims and there are no male members. Parvin, Raman and Minar appear to be cousins and also they being villagers, they might have confused as to what should be done with the injured at night. On the next day morning, they approached Sarpanch. Ordinarily in villages, Sarpanch is the friend, philosopher and guide of the villagers and they only act as per the advise and guidance of Sarpanch. So when the Sarpanch was called on the next day and was told about the incident, the injured was removed to the hospital. Facts as to the incident were disclosed immediately at night by PW 2 to PW 3 and PW 5. On the next day morning, the very facts were disclosed to PW 4 and PW 1, who in his turn advised to remove the injured to hospital and it is he who has gone to lodge the complaint. When the injured was admitted in Vyara hospital at 1.00 p.m., after the admission of the injured in the hospital, PW 1 or PW 3 could have gone to Police Station and could have lodged the complaint. To answer this question, it will be relevant to refer to the evidence of PW 1. PW 1 in his evidence has stated that after the treatment of the injured commenced in Vyara Primary Health Centre and he regained consciousness and started speaking, however confused, he has left for Police Station. This suggests that he has not left the injured till he felt that the injured was out of danger at the relevant time or till he gained consciousness as he has become unconscious in Vyara. If a seriously injured person is carried in hospital by a person, normally, he will not leave him till he feels satisfied about his condition. It has so happened in the instant case that PW 1 having satisfied that the injured has regained consciousness, has gone to the Police Station and first information is given. There is no suggestion in the cross-examination of PW 1 that he had any enmity or had any reason worth the name to involve the accused in the instant case. On the contrary, from the nature of cross-examination, it appears that the defence has tried to show that the accused was not there in the village as he was doing job of cutting diamonds. A suggestion is made to PW 1 that he has wrongly named the accused in collusion with Parmesh bhai who is the cousin of deceased. Parmesh is examined as PW 4. If we read the evidence of Parmesh, not a single question is put to him as to whether he has strained relations with the accused in any form. Minor contradictions are there. This explains away delay if any in filing complaint. However, they are not relevant, in our opinion, to affect the

evidence of the prosecution witnesses. Thus, in our opinion, evidence of PW 2 is corroborated by the evidence of PW 5, 4 and 1 and has been rightly accepted by the learned Addl. Sessions Judge.

From the evidence of PW 2 it is clear that axe blows were inflicted on the person of deceased. The deceased was first examined by Dr. Soni, PW 10 at Panchol. He has taken stitches and he has described two wounds as contused lacerated wounds. However, he has stated that by the muddamal axe, both the injuries can be caused. These injuries are possible by a sharp edge of the axe also. A question was put to him by the Court that he has not referred the wounds as incise wound and he has replied that as the wounds were not clear cut wounds, they are not described as incise wounds. He has also stated that if the edge of the weapon is not sharp, then also contused lacerated wound can be caused. Even in the cross-examination, he has stated that both the injuries can be caused by muddamal axe either by blunt part or edged part. He has denied that the second injury on the rear side of the head is not possible by a stone. He has, however, stated that if one falls with force on stone, both the injuries can be caused. As stated above, the injuries are on the forehead and on the rear part of the head. By a fall injuries can be caused, but one has to imagine as to how one can fall with force unless some one lifts and throws him, or there is a forceful push, there will be no fall by force. From Panchol, the injured was taken to Vyara where Dr. Mahesh, PW 7, has treated him. At that time, the injured was conscious. However, he was not able to say the nature of the injury as the wounds were sutured. The doctor has deposed on the line of Dr. Soni, PW 10 as regards injuries. From there, he was taken to Surat hospital. Dr.Mahesh, PW 7, did ask him his name and time of incident. But he did not ask him anything more. In the instant case, it appears that no attempt is made to record dying declaration. In any case, there are two injuries one on occipital region and other on temporo-parital region. After he was removed to the Surat hospital, the injured died. Dr.Meghrekhaben Mehta, PW 6 has performed autopsy. She has found two external injuries which are referred to by doctors, PW 7, 10 and PW 2. According to the doctor who performed autopsy, both these injuries are individually sufficient in the ordinary course of nature to cause death. Both the injuries are possible by muddamal weapon. She has also admitted that the injuries on the person of the deceased were possible by blunt or edged part of the weapon. When these injuries are singularly sufficient in the ordinary course of nature to

cause death, the question is under which provision of Penal Code, the case of the accused would fall.

Mr Uppal has contended that the case of the accused would fall within the purview of section 304 Part II and not under section 302 of the IPC. To substantiate his say, he has relied on a judgment in the case of Harish Kumar v. State (Delhi Administration), (1993 Cri. L.J.441). The learned Judges in para 7 & 8 have observed as follows:

"7. We have seen the nature of the injuries and also the time gap between the time of infliction of the injury till the date of death which was two days after the injury was inflicted. We have no sufficient material as to the nature of the treatment given to the deceased during those two days.

8. Under these circumstances, though the injury had resulted in the death of the deceased, we cannot conclusively say that it was sufficient to cause his death. ....."

In para 6, it is referred that as per the doctor, injury was sufficient in the ordinary course of nature to cause death. Thus when the doctor has said that the injury was sufficient in the ordinary course of nature to cause death, the Court cannot hold that they cannot conclusively say that it was sufficient to cause his death. Therefore, in our opinion, this cannot be said to be a precedent as the observations of the learned Judges are based on the facts and circumstances of that case. We have, therefore, to decide whether the case of accused in the instant case would fall within the purview of clause 3 of section 300 or in any of the exceptions to bring within the purview of section 304 Part II.

Mr Uppal has relied upon a judgment in the case of Mavila Thamban Nambiar vs. State of Kerala (1977 SCC (Cri) 726. Before we refer to the ratio of that case, it will be relevant to refer to some facts of that case :

"9. Mr Lalit then urged that it was Madhavan who initially picked up a quarrel in the shop of the appellant which was followed by a scuffle. The appellant had also sustained injury on his head and this injury was not explained by the prosecution. It would, therefore, be reasonable to infer that Madhavan had attacked the appellant by causing an injury on the head and therefore,

he was the aggressor and the appellant had a right of private defence. We see no substance in this contention. Madhavan was totally unarmed and when he was held by A. Narayanan (PW 6) to take him away, the appellant caused the injury on the vital part of the body of Madhavan with the pair of scissors. On these proved facts, it is not possible to accept the contention that the appellant had any right of private defence.

10. Mr Lalit then, seriously challenged the conviction of the appellant under Section 302 of the Indian Penal Code. He urged that the appellant had neither intention nor knowledge that such an injury would result into the death of Madhavan. He, therefore, urged that the appellant at the most could be convicted for any other minor offence. Mr George, appearing for the State of Kerala urged that the appellant was rightly convicted under Section 302 of the Indian Penal Code and no interference was called for. After giving our careful thought to the nature of offence, we are of the considered view that the offence of the appellant would more appropriately fall under Section 304 Part II of the Indian Penal Code. The appellant had given one blow with a pair of scissors on the vital part of the body of Madhavan, and, therefore, it would be reasonable to infer that he (appellant) had knowledge that any injury with the pair of scissors on the vital part would cause death though he may not have intended to commit the murder. We accordingly alter the conviction of the appellant from Section 302 IPC to one under Section 304 Part II of the IPC."

In our opinion, the facts in the case of Mavila (supra) are little different than the facts of the present case. In the present case, in the evening of 8th July, 1990, when the deceased was going home in company of his minor daughter after visiting the house of someone, he was assaulted by the accused. There is no suggestion that any sort of quarrel or exchange or anything took place between the two. The deceased was quietly assaulted when he was going to his house. Two blows of axe were given on the head portion. Each injury is individually sufficient in the ordinary course of nature to cause death. Simply because the victim has died after two days by itself does not bring the case of the accused within the purview of section 304 Part II. We are not able to accept the argument of Mr Uppal that if sufficient timely

treatment would have been given, the deceased would have survived. Accused survived after assault, be it for a day or more, is his fortune and not that of accused who caused injuries which are sufficient in the ordinary course of nature to cause death.

Simply because the injured survived for two days, it cannot be said that it cannot be culpable homicide amounting to murder if it falls within purview of section 300 of the Indian Penal Code. Case of the accused, on the proved facts on record does not fall in any exception or explanation to section 300. Therefore, the case of the accused, in our opinion, squarely falls within the purview of section 302 of the Indian Penal Code. We, therefore, do not find any reason to interfere with the finding and conclusion arrived at by the learned Addl. Sessions Judge and the appeal is liable to be dismissed.

In the result, the appeal fails and is dismissed.

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(vjn)